

**Office of Chief Counsel  
Internal Revenue Service**

**memorandum**

CC:WR:SCA:LN:GL-805831-00

WBDouglass

date: AUG 31 2000

to: Chief, Appeals Division, Southern California District,  
Attention: Beth Thurston, Appeals Officer

from: Southern California District Counsel, Laguna Niguel CC:WR:SCA:LN  
Willis B. Douglass, Attorney; Miriam A. Howe, ADC

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subject: CDP Case: Assessed Frivolous Return Penalties for [REDACTED] and [REDACTED]  
Taxpayers: [REDACTED] TIN: [REDACTED]

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This advice is not binding on Appeals and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

By transmittal dated June 29, 2000, you requested our advice as to how to handle the taxpayers' collection due process case. This memorandum is in response to your request.

**ISSUES**

(1) Should issues arising under I.R.C. § 6320 concerning the taxpayers' [REDACTED] and [REDACTED] tax liabilities be considered at the taxpayers' collection due process hearing under I.R.C. § 6330?

(2) Should issues concerning the taxpayers' [REDACTED] income tax liability, or issues arising from the filing of an NFTL for that

year, be considered at the taxpayers' collection due process hearing under I.R.C. § 6330?

### CONCLUSIONS

(1) The answer to this question depends upon whether the § 6320 notice was sent to the taxpayers' last known address. If it was sent to the taxpayers' last known address, the taxpayers are entitled only to an equivalent hearing. If the notice was not sent to the taxpayers' last known address, we recommend that the collection due process hearing be delayed until the IRS complies with the requirements of I.R.C. § 6320.

(2) Issues arising under I.R.C. § 6330 for [REDACTED] should not be considered at the collection due process hearing, since this tax year was not listed on the notice of intent to levy and was not included on the taxpayers' request for a collection due process hearing. Whether the taxpayers may become entitled to a hearing under I.R.C. § 6320 for [REDACTED] depends upon whether the notice of lien filing for [REDACTED] was sent to the taxpayers' last known address. This is discussed in more detail below.

### FACTS

On [REDACTED], the IRS assessed against [REDACTED], the taxpayers, frivolous return penalties under I.R.C. § 6702 for [REDACTED] and [REDACTED]. On [REDACTED], the IRS assessed against the taxpayers an income tax deficiency for tax year [REDACTED]. On [REDACTED], the IRS filed a notice of federal tax lien ("NFTL") against the taxpayers for the frivolous return penalties for [REDACTED] and [REDACTED]. On [REDACTED], the IRS prepared and signed an NFTL against the taxpayers for the [REDACTED] income tax deficiency. This NFTL was recorded on [REDACTED]. Both NFTLs were filed in Riverside County, California. Pursuant to I.R.C. § 6320(a), the IRS sent a notice of lien filing for each of these NFTLs to the taxpayers at [REDACTED]<sup>1</sup>. However, it appears that this address was incorrect, since the taxpayers never received notice of the filing of the NFTLs. It is not clear whether the address to which the notices of lien filing were sent was the taxpayers' "last known address" within the meaning of I.R.C. § 6320(a)(2)(C).

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<sup>1</sup>We have reviewed a copy of the § 6320 notice bearing a date in [REDACTED], (the exact date is illegible) for the [REDACTED] income tax liability which was sent to this address. We have not seen a copy of the § 6320 notice for the [REDACTED] and [REDACTED] liabilities, but we understand that it was sent to this address as well.

On [REDACTED], the IRS sent a Letter 1058, *Final Notice of Intent to Levy and Notice of Your Right to a Hearing* ("the Final Notice") addressed to [REDACTED]. The Final Notice covered only the frivolous return penalties for [REDACTED] and [REDACTED]; it said nothing about the income tax liability for [REDACTED]. In response, the taxpayer filed a *Request for a Collection Due Process Hearing* ("the Request"). The Request was received by the IRS on [REDACTED]. On the Request the taxpayers listed their address as [REDACTED]. Under the printed phrase "Filed Notice of Federal Tax Lien" on the Request, the taxpayers entered "N/A." Under the printed phrase "Notice of Levy/Seizure" on the Request, the taxpayers stated, "Please refer to three-page attachment." The three-page attachment said nothing about any of the NFTLs or the [REDACTED] income tax liability.

The Request was handled by the IRS Appeals Office in Riverside, California and was assigned to a detailee from the Collection Division. A hearing was scheduled for [REDACTED] in Riverside. More than ten days before the scheduled hearing date, the taxpayers informed Appeals that they wished to bring a court reporter to the hearing. The taxpayers and their son, [REDACTED], arrived at the appointed time, accompanied by a court reporter. The taxpayers stated that they desired to record the proceedings and to have the reporter prepare a certified transcript of the recording. The taxpayers offered to provide the IRS with a copy of the transcript. The detailee-AO and her manager refused to permit the court reporter to attend the hearing because the IRS did not have its own recording equipment available. Upon being told Appeals' position, the taxpayers refused to attend the hearing, and the taxpayers, their son and the court reporter departed.

On [REDACTED], Appeals issued its Notice of Determination based on the facts that it had. The Notice of Determination concluded with the following paragraph:

Because the letter explaining the basis for the penalty assessment was not sent to you at the P.O. Box address, I have recommended that all collection action be suspended until you are given this explanation and an opportunity to respond, as previously directed by the Chief of Appeals. Notices of Federal Tax Lien were filed when the Revenue Officer received no response to the letter sent to your street address on [REDACTED]. I am also recommending those Notices be withdrawn.

The IRS has no record of the taxpayers' having filed a personal income tax return for [REDACTED] or [REDACTED]. The taxpayers' [REDACTED] tax year is currently under examination, and the IRS has prepared a substitute for return for that year. The remaining background facts for this case are set forth in great detail in the attached Appeals Case Memorandum which was prepared in connection with the issuance of the Notice of Determination dated [REDACTED].

After the Notice of Determination was issued, questions arose as to (1) whether Appeals was correct in its refusal to allow the taxpayers to bring a court reporter into the collection due process hearing, and (2) whether Appeals was correct in asserting jurisdiction over the NFTLs under collection due process and including a determination concerning the NFTLs in the Notice of Determination. Appeals management decided to rescind the Notice of Determination. This was done less than thirty days after the notice was issued. Prior to rescission of the Notice of Determination, the taxpayers had not filed a petition in the Tax Court or in the United States District Court.

You have not asked for our opinion on the issue of whether the court reporter should have been admitted to the collection due process hearing. Therefore, this memorandum will address only the issue of the proper treatment of the NFTLs.

## ANALYSIS

### A. I.R.C. § 6330

The IRS Restructuring and Reform Act of 1998, P.L. 105-206, ("RRA 98") added § 6330 to the Internal Revenue Code. I.R.C. § 6330 provides that no levy may be made against the property or rights to property of any person unless the IRS notifies that person in writing of his or her right to a collection due process ("CDP") hearing under I.R.C. § 6330 before the IRS Office of Appeals. Only one such notice is required for the taxable period(s) to which the levy relates. I.R.C. § 6330(a)(1). After the notice has been issued, the IRS must wait thirty days before it may serve the levy. If, during the thirty-day period following the notice, the taxpayer requests a hearing under I.R.C. § 6330, the IRS is further prohibited from issuing any levies for the taxable years subject to the hearing. This prohibition continues until the ninetieth day after the final determination is made in such hearing. I.R.C. § 6330(e)(1).

Appeals' final determination is set forth in a Notice of Determination which is mailed to the taxpayer's last known address. If a taxpayer is dissatisfied with the results of a hearing before Appeals, the taxpayer may appeal to the Tax Court or to an

appropriate district court, depending upon the type of tax involved. I.R.C. § 6330(d)(1). If the taxpayer appeals the IRS's final determination to a court, the prohibition on serving the levy continues while the case is pending before the court, unless the underlying merits of the tax are not at issue and the IRS shows good cause not to postpone service of the levy. I.R.C. § 6330(e).

#### **B. I.R.C. § 6320**

RRA 98 also added § 6320 to the Internal Revenue Code. Effective for NFTLs filed on or after January 19, 1999, the IRS is required to provide a taxpayer with the opportunity to administratively appeal the filing of the NFTL by submitting to the IRS a formal request for a CDP hearing with the IRS Appeals Office. The IRS must notify a taxpayer of his CDP rights no later than five business days after the NFTL is filed. I.R.C. § 6320(a). Under I.R.C. § 6320(a)(2), this notice must be (A) given in person; (B) left at the dwelling or the usual place of business of the taxpayer; or (C) sent by certified or registered mail to the taxpayer's last known address.

The taxpayer has thirty days after the end of the fifth business day in which to submit a request for a CDP hearing. I.R.C. § 6320(a)(3)(B); Temp. Treas. Reg. § 301.6320-1T(c), Q&A-C3 and Q&A-C5. The request must be in writing and include the reason or reasons why the taxpayer disagrees with the filing of the NFTL. Temp. Treas. Reg. § 301.6320-1T(c), Q&A-C2.

Under I.R.C. § 6320, as under I.R.C. § 6330, Appeals sets forth its final determination in a Notice of Determination which is mailed to the taxpayer's last known address. The determination of the Appeals Office is subject to judicial review if the taxpayer files a timely appeal with the proper court. I.R.C. §§ 6320(c) and 6330(d).

#### **C. The Relationship Between I.R.C. §§ 6330 and 6320**

I.R.C. § 6320(b)(4) provides that "[t]o the extent practicable, a hearing under [I.R.C. § 6320] shall be held in conjunction with a hearing under § 6330." In addition, the regulations under I.R.C. § 6320 provide as follows:

Q-D2. Will a CDP hearing with respect to one tax period be combined with a CDP hearing with respect to another tax period?

A-D2. To the extent practicable, a hearing with respect to one tax period shown on the NFTL will be combined with any and all other

hearings to which the taxpayer may be entitled with respect to other tax periods shown on the NFTL.

Q-D3. Will a CDP hearing under section 6320 be combined with a CDP hearing under section 6330?

A-D3. To the extent practicable, a CDP hearing under section 6320 will be held in conjunction with a CDP hearing under section 6330.

Temp. Treas. Reg. § 301.6320-1T(d), Q&A-D2 and Q&A-D3.

There is no provision in I.R.C. § 6330 that is analogous to I.R.C. § 6320(b)(4), but the regulations under I.R.C. § 6330 contain a provision that is almost identical to Temp. Treas. Reg. § 301.6320-1T(d), Q&A-D2 and Q&A-D3. Temp. Treas. Reg. § 301.6330-1T(d) provides as follows:

(d) *Conduct of CDP hearing--(1) In general.* If a taxpayer requests a CDP hearing under section 6330(a)(3)(B) (and does not withdraw that request), the CDP hearing will be held with Appeals. The taxpayer is entitled to only one CDP hearing under section 6330 with respect to the tax and tax period or periods shown on the CDP Notice. To the extent practicable, the CDP hearing requested under section 6330 will be held in conjunction with any CDP hearing the taxpayer requests under section 6320.

. . . .

Q-D2. Will a CDP hearing with respect to one tax period be combined with a CDP hearing with respect to another tax period?

A-D2. To the extent practicable, a hearing with respect to one tax period shown on a CDP Notice will be combined with any and all other hearings to which the taxpayer may be entitled with respect to other tax periods shown on the CDP Notice.

Q-D3. Will a CDP hearing under section 6330 be combined with a CDP hearing under section 6320?

A-D3. To the extent it is practicable, a CDP hearing under section 6330 will be held in conjunction with a CDP hearing under section 6320.

Temp. Treas. Reg. § 301.6330-1T(d); Q&A-D2 and Q&A-D3.

**D. Does Appeals Have Jurisdiction over the NFTLs for [REDACTED], [REDACTED] and [REDACTED]?**

In the present case, the taxpayers received a notice of intent to levy and notice of a right to hearing under I.R.C. § 6330 for frivolous return penalties for [REDACTED] and [REDACTED]. The taxpayers timely requested a CDP hearing under I.R.C. § 6330 for these two years. The IRS also sent to the taxpayers a notice under I.R.C. § 6320 for NFTLs filed for the two frivolous return penalty assessments, as well as a notice for the [REDACTED] income tax assessment discussed above. However, the taxpayers did not receive the § 6320 notices, and they have not requested a CDP hearing on the lien issue for [REDACTED], [REDACTED] or [REDACTED]. As noted above, it is not clear whether the § 6320 notices were sent to the taxpayers' last known address within the meaning of I.R.C. § 6320(a)(2)(C). Therefore, we must consider two alternative situations: (1) The § 6320 notices were sent to the taxpayers' last known address, but the taxpayers did not receive them; or (2) The § 6320 notices were not sent to the taxpayers' last known address.

**E. Procedures to Be Followed if Appeals Determines that the § 6320 Notices on the [REDACTED], [REDACTED] and [REDACTED] NFTLs Were Sent to the Taxpayers' Last Known Address.**

Neither I.R.C. § 6320 nor I.R.C. § 6330 makes any provision for what happens if a taxpayer receives a CDP notice and requests a CDP hearing, but the request is not made within the statutory time limits. However, the regulations under I.R.C. § 6320 provide as follows:

(i) *Equivalent hearing*--(1) *In general.* A taxpayer who fails to make a timely request for a CDP hearing is not entitled to a CDP hearing. Such a taxpayer may nevertheless request an administrative hearing with Appeals, which is referred to herein as an "equivalent hearing." The equivalent hearing will be held by Appeals and will generally follow Appeals procedures

for a CDP hearing. Appeals will not, however, issue a Notice of Determination. Under such circumstances, Appeals will issue a Decision Letter.

Temp. Treas. Reg. § 301.6320-1T(i).

Therefore, we conclude that if the § 6320 notice for the [REDACTED] and [REDACTED] NFTLs was sent to the taxpayers' last known address, the taxpayers are entitled to an equivalent hearing, but not a CDP hearing, on the issue of the appropriateness of filing the NFTLs. We believe that I.R.C. §§ 6320(b)(4) and the regulations thereunder, and Temp. Treas. Reg. § 301.6330-1T(d) provide authority for Appeals to consider the CDP case under I.R.C. § 6330 and the equivalent hearing case under I.R.C. § 6320 in one hearing. However, if the two cases are heard together, it will be necessary, at the conclusion of the hearing, to issue a Notice of Determination for the § 6330 issues, and a separate decision letter for the § 6320 issues.

The taxpayers have not yet requested a hearing under I.R.C. § 6320 on the filing of the NFTL for the [REDACTED] income tax liability. However, if the taxpayers so request, they are entitled to an equivalent hearing on the [REDACTED] NFTL as well.

**F. Procedures to Be Followed if Appeals Determines that the § 6320 Notices Were Not Sent to the Taxpayers' Last Known Address.**

I.R.C. § 6320 says nothing about what happens if the IRS does not provide the notice required by I.R.C. § 6320(a)(1) within five business days of the filing of the notice of lien, but the regulations provide as follows:

Q-A12. What if the taxpayer does not receive the CDP Notice because the IRS did not send that notice by certified or registered mail to the taxpayer's last known address, or failed to leave it at the dwelling or usual place of business of the taxpayer, and the taxpayer fails to request a CDP hearing with Appeals within the 30-day period commencing the day after the end of the five business day notification period?

A-A12. A NFTL becomes effective upon filing. The validity and priority of a NFTL is not conditioned on notification to the taxpayer pursuant to section 6320. Therefore, the failure to notify the taxpayer concerning the



filing of a NFTL does not affect the validity or priority of the NFTL. When the IRS determines that it failed properly to provide a taxpayer with a CDP Notice, it will promptly provide the taxpayer with a substitute CDP Notice and an opportunity to request a CDP hearing.

Temp. Treas. Reg. § 301.6320-1T(a), Q&A-12.

Based on this regulation, we recommend that if Appeals determines that the § 6320 notices in the present case were not sent to the taxpayers' last known address, Appeals should inform the Collection Division of this fact. In order to avoid any improper ex parte contact with Collections, Appeals' communication should be limited to the simple statement that Appeals has determined that the § 6320 notices were not sent to the taxpayers' last known address. Appeals should then inform the taxpayers that the NFTLs were filed, and that the IRS had attempted to notify the taxpayers of the filing of the liens, but that the § 6320 notices had not been sent to the correct address. Appeals should inform the taxpayers to expect a duplicate § 6320 notice, and Appeals should ask the taxpayers if the taxpayers wish to delay their CDP hearing so that a hearing under I.R.C. § 6320 on the filing of the NFTLs may be consolidated with the currently pending CDP hearing.

**G. Hearings under I.R.C. § 6330 Have a Separate Statutory Basis from Hearings under I.R.C. § 6320.**

Even though I.R.C. § 6330(c)(2)(A) provides that a taxpayer may "raise at the hearing any relevant issue relating to the unpaid tax or the proposed levy," we do not think that this statutory provision authorizes Appeals to consider the § 6320 NFTL issues in a hearing that arises under I.R.C. § 6330 unless the taxpayers properly bring the NFTL issues before Appeals under I.R.C. § 6320. I.R.C. § 6330(c)(2)(A) lists some matters which may be considered at a hearing under I.R.C. § 6330, including (i) appropriate spousal defenses; (ii) challenges to the appropriateness of collection actions; and (iii) offers of collection alternatives. If Congress had intended to give Appeals authority to consider lien issues at a hearing under I.R.C. § 6330, without "going through" I.R.C. § 6320, we think that Congress would have made a specific provision therefor, particularly in light of the fact that Congress provided a separate statute, i.e., I.R.C. § 6320, which addresses lien issues.

**H. The Income Tax Liability for [REDACTED].**

The relationship between the issues under I.R.C. § 6320 arising from the filing of the NFTLs for [REDACTED] and [REDACTED] and the levy issues which are before Appeals under I.R.C. § 6330 in this case presents difficult questions, as illustrated by the above discussion. NFTLs were filed for the same years and for the same taxes which are before Appeals in the levy case now pending under I.R.C. § 6330. However, the [REDACTED] income tax liability, and the filing of an NFTL for that year, do not present the same problem: this is a different year and a different type of tax. Moreover, the [REDACTED] income tax liability was not listed on the notice of intent to levy which gave rise to this CDP appeal. See Temp. Treas. Reg. § 301.6330-1T(d); Q&A-D2, and Temp. Treas. Reg. § 301.6320-1T(d); Q&A-D2, both quoted above. Therefore, we conclude that Appeals has no jurisdiction over any issue arising under I.R.C. § 6330 concerning the taxpayers' [REDACTED] income tax liability.

At present, Appeals has no jurisdiction under I.R.C. § 6320 over the NFTL which was filed for the [REDACTED] income tax liability. As noted above, if the § 6320 notice for [REDACTED] was sent to the taxpayers' last known address, the taxpayers may request an equivalent hearing, but not a CDP hearing, for [REDACTED] under I.R.C. § 6320. If the § 6320 notice for [REDACTED] was not sent to the taxpayers' last known address, then the NFTL for [REDACTED] is in the same posture as the NFTLs for [REDACTED] and [REDACTED], and our recommendations under Part F above would apply to the [REDACTED] NFTL.

In any event, we believe that the original Notice of Determination discussed above, now rescinded, was incorrect in determining that the NFTL filed for [REDACTED] income taxes should be withdrawn. As noted above, Appeals has no jurisdiction over [REDACTED] under I.R.C. § 6330. Under I.R.C. § 6320, the taxpayers may be entitled to an equivalent hearing, or they may be entitled to a CDP hearing, depending upon the resolution of the last-known-address issue discussed above.

We will maintain an open file in this case pending Appeals' determination of whether the § 6320 notice discussed above was sent to the taxpayers' last known address.

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